FINMARK CONSULTANTS PTD. LTD.

v.

DEVELOPMENT & COMMERCIAL BANK BERHAD

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HJ MOHD EUSOFF BIN CHIN CJ (MALAYA),
DATO' PEH SWEE CHIN SCJ,
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[CIVIL APPEAL NO. 02-85-93]
13 JULY 1994

CONTRACT: Defendant granting plaintiff option to purchase - Plaintiff attempting to exercise option - Defendant indicating inability to strictly fulfill terms of agreement - Whether there was an anticipatory breach of contract - Plaintiff not accepting breach but nevertheless failing to pay the required amount within the specified time - Effect - Plaintiff applying for specific performance of the agreement - Whether could be granted - Whether plaintiff entitled to damages for breach of contract.

The plaintiff and the defendant entered into an option agreement, with a sale and purchase agreement annexed thereto (the agreement) whereby the defendant agreed to sell and the plaintiff agreed to buy a piece of land for the sum of RM35 million. The option was to be exercised at the very latest by 27 November 1989 by the payment of RM3.5 million representing 10% of the purchase price. It was *inter alia* a term of the agreement that the completion date for the purchase was 30 December 1989.

The plaintiff attempted to tender the sum of RM3.5 million on 25 November 1989 but was informed that 2 caveats had been lodged on the land, the subject matter of the sale. The defendant proposed amendments to the agreement by the incorporation of clauses leaving the completion date open by which the plaintiff concluded that the defendant was repudiating the agreement. The plaintiff refused to accept the repudiation but neveretheless failed to pay the sum of RM3.5 million to the defendant.

The plaintiff applied for specific performance of the agreement and for damages for breach of contract. The learned trial Judge dismissed the plaintiff's claims on the grounds that: (a) the lodging of the 2 caveats was not the act of the defendant who could not be blamed; (b) as the plaintiff had made its stand clear that it did not accept any repudiation and that it regarded the option agreement as still subsisting, the plaintiff must exercise the option to buy and had not done so by 27 November 1989; (c) the option agreement was a unilateral contract and the defendant was not obliged to do anything until the option was exercised; and (d) the removal of the caveats would not be difficult and it was premature for the plaintiff to say that the defendant was in breach.

The plaintiff appealed further.

Held:

[1] Although the lodging of the 2 caveats by third parties was not the act of the defendant, the performance by the defendant of delivery of the memorandum of transfer and issue of document of title for registration in favour of the purchaser by the completion date of 30 December 1989 became impossible because of the 2 caveats.

[2] There was no express provision in the agreement governing such a position and neither was there a *force majure* clause to excuse performance by the vendor on account of any extraneous event obstructing the performance. In the circumstances, the plaintiff was not discharged from liability although performance became impossible through no fault of his own, for if a party makes an unqualified or absolute promise, he accepts the risk of the performance of that promise becoming impossible.

[3] Looking at the option agreement, in particular, its clause 8, the vendor is bound to sell the land to the purchaser and the purchaser is bound to exercise the option to purchase. Therefore there is really no option granted to either not to buy or not to sell as the case may be and the learned Judge was wrong in holding that the option agreement was a unilateral contract.

[4] The conduct and circumstances on the 25 November 1989, primarily with regard to the defendant's solicitors letter, amounted to a repudiation of the option agreement when it was still executory, for the time for performance by the vendor to deliver a valid and registrable transfer of the said land free from all encumbrances on or before 30 December 1989 had not arrived. In the circumstances there was an anticipatory repudiation of the agreement on the part of the vendor.

[5] The plaintiff could opt to either affirm the contract by treating it as still in force, or treat it

as finally and conclusively discharged. The plaintiff, by its solicitor's letter of 27 November 1989, expressly stated that it wanted the contract to be kept alive and in the circumstances the option agreement survived and remained for the benefit of both parties.

[6] The plaintiff, inspite of having affirmed the contract, by failing to pay the requisite sum within the stipulated period, and therby not complying with clause 5 of the agreement, has itself subsequently caused an anticipatory breach of the option agreement in a similar though not reprehensible way.

[7] However as the vendor has never made known its intention to accept such anticipatory repudiation, the option agreement continues its existence for when there is an anticipatory repudiation of an executory contract, such a contract continues in existence until the innocent party makes known his intention to accept such repudiation.

[8] In the circumstances of this case the lower Court had erred in declining to order specific performance of the agreement which should be granted as the two caveats lodged have subsequently been removed. The total sum of RM150,000 paid by the plaintiff to the defendent under the agreement would have to be refunded to the plaintiff according to the construction of the terms of the option agreement.

[9] Since there was wrongful anticipatory repudiation on 25 November 1989 on the part of the defendant balanced or countered by the wrongful anticipatory repudiation on 27 November 1989 on the part of the plaintiff, neither party should be liable for damages to the other party.

[Appeal allowed with costs. Specific performance of option agreement ordered. Directions given for carrying order into effect].

[Bahasa Malaysia Translation of Headnote]

KONTRAK: Defendan memberikan plaintif opsyen untuk membeli - Plaintif cuba melaksanakan opsyen - Defendan menunjukkan ketidak-upayaan untuk secara berkesannya memenuhi terma-terma perjanjian - Samada terdapatnya kemungkiran kontrak dalam jangkaan - Plaintif tidak menerima kemungkiran namun demikian gagal untuk membayar jumlah yang diperlukan dalam tempoh yang ditetapkan - Kesan - Plaintif memohon pelaksanaan spesifik perjanjian tersebut - Samada dapat diberikan. Samada plaintif berhak kepada gantirugi bagi kemungkiran kontrak.

Plaintif dan defendan telah memasuki satu perjanjian opsyen, dengan satu perjanjian jualbeli dilampirkan padanya (perjanjian tersebut) di mana defendan telah bersetuju untuk menjual dan plaintif telah bersetuju untuk membeli sebidang tanah dengan jumlah sebanyak RM35 juta. Opsyen tersebut hendaklah dilaksanakan selewat-lewatnya pada 27 November 1989, melalui pembayaran sebanyak RM3.5 juta yang mewakili 10% daripada harga belian. Ianya adalah antara lainnya satu terma perjanjian tersebut bahawa tarikh penyempurnaan pembelian adalah 30 Disember 1989.

Plaintif telah cuba untuk menawarkan jumlah sebanyak RM3.5 juta itu pada 25 November 1989, tetapi telah diberitahu bahawa 2 kaveat telah diserah-simpan ke atas tanah tersebut, hal-perkara penjualan tersebut. Defendan mencadangkan pindaan-pindaan kepada perjanjian tersebut melalui penggabungan fasal-fasal dengan meninggalkan tarikh penyempurnaan terbuka yang mana plaintif membuat kesimpulan bahawa defendan telah menolak perjanjian tersebut. Plantif enggan menerima penolakan tersebut tetapi walaubagaimana pun telah gagal untuk membayar jumlah sebanyak RM3.5 juta itu kepada defendan.

Plaintif telah memohon pelaksanaan spesifik perjanjian tersebut dan gantirugi bagi kemungkiran kontrak. Tuan Hakim perbicaraan yang bijaksana telah menolak tuntutan plaintif atas alasan bahawa: (a) penyerah-simpanan kedua-dua kaveat tersebut bukannya tindakan yang dilakukan oleh defendan yang tidak boleh dipersalahkan; (b) oleh kerana plaintif telah menjelaskan bahawa ia tidak menerima sebarang penolakan dan bahawa ia menganggapkan perjanjian opsyen tersebut sebagai masih kekal, plaintif haruslah melaksanakan opsyen untuk membeli dan telah tidak melakukannya sehingga 27 November 1989; (c) perjanjian opsyen tersebut adalah kontrak satu pihak dan defendan tidak berkewajipan untuk melakukan apa-apa sehingga opsyen tersebut dilaksanakan; dan (d) pembatalan kaveat-kaveat tersebut bukannya susah dan ianya adalah awal bagi plaintif menyatakan bahawa defendan telah memungkiri perjanjian.

Plaintif telah merayu selanjutnya.

Diputuskan:

[1] Walaupun penyerah-simpanan kedua-dua kaveat tersebut oleh pihak-pihak ketiga bukannya tindakan plaintif, pelaksanaan oleh plaintif terhadap penghantaran memorandum pindahmilik tersebut dan dokumen hakmilik keluaran untuk pendaftaran atas nama pembeli sebelum tarikh penamatan, 30 Disember 1989, menjadi mustahil disebabkan oleh kedua-dua kaveat tersebut.

[2] Tidak terdapat peruntukan nyata dalam perjanjian tersebut yang mengawal kedudukan yang sedemikian dan tidak terdapat juga fasal *force majure* untuk mendalihkan pelaksanaan oleh pembeli disebabkan oleh mana-mana peristiwa luar yang menghalang pelaksanaan tersebut. Dalam keadaan yang sedemikian, plaintif tidak dilepaskan daripada tanggungan walaupun bukan kesalahannya sendiri, pelaksanaan menjadi mutlak kerana jika sesuatu pihak itu membuat janji yang mutlak atau sesungguhnya benar ia menerima risiko pelaksanaan janji tersebut menjadi mustahil.

[3] Melihat perjanjian opsyen tersebut, khususnya, fasal 8, penjual akan pasti menjual tanah tersebut kepada pembeli dan pembeli pula pasti akan melaksanakan opsyen untuk membeli. Dengan itu sesungguhnya tidak terdapat opsyen yang telah diberikan untuk samada tidak membeli atau pun tidak menjual sepertimana keadaannya dan Hakim yang bijaksana telah tersalah dalam memutuskan bahawa perjanjian opsyen tersebut adalah kontrak satu pihak.

[4] Keadaan pada 25 November 1989, terutamanya berhubung dengan surat Peguamcara defendan, telah membawa kepada penolakan perjanjian opsyen tersebut sedangkan ianya masih boleh dilaksanakan kerana masa bagi pelaksanaan oleh penjual untuk mengemukakan pindahmilik tanah tersebut yang sah dan boleh didaftarkan, yang bebas daripada semua bebanan pada atau sebelum 30 Disember 1989 masih belum sampai. Dalam keadaan yang sedemikian terdapat penolakan jangkaan perjanjian tersebut di pihak penjual.

[5] Plaintif boleh memilih samada untuk mengikrarkan kontrak tersebut dengan menganggapnya sebagai masih berkuat-kuasa atau menganggapnya sebagai akhirnya atau secara muktamadnya dilepaskan. Plaintif melalui surat peguamcaranya bertarikh 27 November 1989, secara nyatanya mengatakan bahawa ia menghendakkan supaya kontrak tersebut dikekalkan dan dalam keadaan yang sedemikian perjanjian opsyen tersebut menjadi kekal untuk kepentingan kedua-dua pihak.

[6] Plaintif, walaupun telah mengikrarkan kontrak tersebut, dengan gagal membayar jumlah yang diperlukan itu dalam tempoh yang ditentukan, dan dengan yang demikian telah tidak mematuhi fasal 5 perjanjian tersebut, telah dengan sendirinya berikutan itu menyebabkan kemungkiran dalam jangkaan terhadap perjanjian opsyen tersebut dalam cara yang sama walaupun tidak begitu kebersalahan.

[7] Walaubagaimanapun oleh kerana penjual telah tidak pernah memberitahu niatnya untuk menerima penolakan dalam jangkaan yang sedemikian, perjanjian opsyen tersebut meneruskan kewujudannya kerana apabila terdapatnya satu penolakan dalam jangkaan terhadap kontrak yang boleh dilaksanakan, kontrak yang sedemikian terus wujud sehingga pihak yang tidak bersalah menyatakan hasratnya untuk menerima penolakan yang sedemikian.

[8] Dalam keadaan kes ini Mahkamah rendah telah salah pertimbangan dalam tidak memerintahkan pelaksanaan spesifik perjanjian tersebut yang mana seharusnya diberikan oleh kerana kedua-dua kaveat yang diserah-simpan telah kemudiannya dibatalkan. Jumlah sepenuhnya sebanyak RM150,000 yang telah dibayar oleh plaintif kepada defendan di bawah perjanjian tersebut haruslah dikembalikan kepada plaintif menurut terma-terma perjanjian opsyen tersebut.

[9] Oleh kerana terdapatnya penolakan dalam jangkaan yang salah pada 25 November 1989, di pihak defendan yang diimbangkan atau dibalas oleh penolakan dalam jangkaan pada 27 November 1989, di pihak plaintif, kedua-dua pihak tidak seharusnya bertanggungjawab bagi gantirugi kepada pihak yang lain itu.

[Rayuan dibenarkan dengan kos. Pelaksanaan spesifik perjanjian opsyen diperintahkan. Arahan-arahan diberi untuk menguatkuasakan perintah].

Cases referred to:

Paradine v. Jane [1647] Allyn 26 ***(refd)***

Martin v. Stout [1925] AC 359 ***(refd)***

Universal Cargo v. Citati [1957] 2 QQB 401 and 436 ***(refd)***
Fercometal v. Mediterranean Shipping Co. (HL), [1988] 3 WLR 200 at 212 ***(foll)***
Howard v. Pickford Tool Co. [1951] 1 KB 417, 421 ***(refd)***

For the appellant - K.S. Narayanan (H.W. Wong with him); M/s. T.H. Su & Co.
For the respondent - D.P. Naban; M/s. Lee Hishamuddin Loong

JUDGMENT

Peh Swee Chin SCJ:

The appellant/plaintiff, (hereafter the purchaser), and the respondent/defendant, (hereinafter the vendor), entered into an option agreement with a view to the sale and purchase of a piece of a land (hereafter the said land) for RM35 million. The option agreement comprising a document called OPTION by a heading therein with a sale and purchase agreement annexed thereto, was signed by the vendor, and addressed to the purchaser. The option agreement is set out below:

Development and Commercial Bank Berhad
Wisma On-Tai Tower Block
161B Jalan Ampang
P O Box 10145
50450 Kuala Lumpur

Finmark Consultants Pte Ltd
No. 20, Kramat Lane
02-01, United House
Singapore 0922

Re: **Option**

1. Whereas we Development & Commercial Bank Berhad, a company incorporated in Malaysia and having our registered office at 7th Floor, Wisma On-Tai, 161B Jalan Ampang, 50450 Kuala Lumpur ("hereinafter referred to as "the grantor") are the registered proprietor of all that piece of land known and described as Lot 413 held under State Lease 2875 in the Mukim of Tebrau, District of Johore Bahru ("the said land").

2. In consideration of you delivering to us a bank guarantee in such form as may be acceptable to us ("the bank guarantee") guarantying payment to us of Malaysian Ringgit One Hundred Thousand (RM100,000), we, the grantor hereby grant you ("the option-holder") an option ("the option") during the option period as hereafter defined, to purchase or cause the purchase of the said land in your name or in the name of other or others as may be nominated by you, upon the terms and conditions set out in the draft sale and purchase agreement attached hereto ("the sale and purchase agreement") at the price of Malaysian Ringgit thirty five million (RM35,000,000).

3. The option period shall be for a period of sixty (60) days commencing from date hereof and expiring at 5.00 p.m. on the 27 October 1989.

4. Notwithstanding clause 3 above, it is agreed that if the option holder shall deliver to us seven (7) days before expiry of the option period another bank guarantee in such form as may be acceptable to us ("the second bank guarantee") guaranteeing payment to us of another sum of Malaysian Ringgit fifty thousand (RM50,000) only, we shall extend the option period for another period of thirty (30) days commencing from the date of expiry of the option period ("the extended option period") which extended option period shall expire at 5.00 p.m. on the 27 November 1989.

5. The option may be exercised by the option-holder before the expiry of the option period or the extended option period (as the case may be) by:

   (a) the option-holder delivering or causing the delivery to the Grantor's solicitors, Messrs Adnan Sundra & Low, Advocates & Solicitors of 2nd Floor, Wisma Budiman, Persiaran Raja Chulan, off Jalan Raja Chulan, 50200 Kuala Lumpur four (4) copies of the sale and purchase agreement duly executed by the purchaser(s) of the said land in the manner hereinafter described:

      (i) if the purchaser(s) of the said land is/are individuals, the execution of the sale and purchase agreement shall be effected before an advocate & solicitor and duly witnessed by such an advocate & solicitor; or

      (ii) if the purchaser of the said land is a company or corporate body, the sale and purchase agreement shall be executed under seal of the company or corporate body and the option-holder shall at the same time of delivering the executed sale and purchase agreement, deliver to the grantor's solicitors the resolution of the board of directors of the company or corporate body duly authorising the purchase of the said land upon the terms and conditions of the sale and purchase agreement and the affixing of the common seal thereon together with the memorandum & articles of association and/or any other documents evidencing incorporation of the company or corporate body;

(b) the option-holder paying or causing the purchaser(s) of the said Land to pay to the grantor a sum of Malaysian Ringgit three million five hundred thousand (RM3,500,000) being ten per cent (10%) of the sale price of Malaysian Ringgit thirty five million (RM35,000,000) in cash or by way of banker's draft, simultaneously with the delivery of the sale and purchase agreement.

6. Time shall be of the essence of the contract for the purpose of the option.

7. If the option shall not be duly exercised in the manner aforesaid, the option shall lapse or shall cease to have any further force or effect.

8. It is hereby expressly agreed between the parties hereto that the grantor shall only demand payment of the aforesaid sums of Malaysian Ringgit one hundred thousand (RM100,000) and/or Malaysian Ringgit fifty thousand (RM50,000) payable under the aforesaid bank guarantees if the option is not exercised in the manner aforesaid on or before the expiry of this option. The grantor covenants and agrees with the option-holder that if the option is exercised in the manner agreed herein, the grantor shall not demand payment under both of the aforesaid bank guarantees, and shall return the said bank guarantees to the option-holder for cancellation immediately upon exercise of the option in the manner aforesaid.

Dated this 29 August 1989.

Signed by Khoo Eng Choo)
as Attorney for and on)
behalf of Development &)
Commercial Bank Berhad)
in the presence of:

Sale and Purchase Agreement

An agreement made is between Development & Commercial Bank Berhad, a company incorporated in Malaysia and having its registered office at 7th Floor, Wisma On-Tai, 161B, Jalan Ampang, 50450 Kuala Lumpur (hereinafter called "the Vendor") of the one part and Finmark Consultants Pte. Ltd. a company incorporated in Singapore and having its office at No. 20, Kramat Lane, 02-01, United House, Singapore 0992 (hereinafter called "the purchaser") of the other part.

Whereas

(1) The vendor is the registered proprietor of all that piece of property more particularly described as Lot 413 held under State Lease 2875 in the Mukim of Tebrau, District of Johore Bahru, Johore measuring approximately 279 acres 1 rood 28 poles (of which 90 acres have been surrendered to the government and 29 acres 35 poles have been acquired by the government) granted for a lease of 99 years which shall expire on the 23 May, 2064 (hereinafter called "the said property"). A true copy of the title to the said property is attached hereto as "Annexure A".

(2) The vendor has agreed to sell and the purchaser has agreed to purchase the said property upon the terms and conditions hereinafter contained.

Now it is hereby agreed as follows:

1. The vendor shall sell and the purchaser shall purchase the said property free from all liens, charges, mortgage and other encumbrances and charges, but subject nevertheless to all conditions of title whether express or implied affecting the same and to the terms and conditions hereinafter contained for the total consideration of ringgit thirty-five million (RM35,000,000) only (hereinafter called "the purchase price").

2. The purchaser shall pay the vendor the purchase price in the following manner:

(a) a sum of ringgit three million and five hundred thousand (RM3,500,000) only ("the deposit") to be paid immediately upon execution hereof; and

(b) subject to clauses below the balance purchase price of ringgit thirty-one million and five hundred thousand (RM31,500,000) only ("the balance purchase price") to be paid on or before 30 December 1989 (hereinafter called the completion date).

3. (a) This sale is subject to the approval of the Foreign Investment Committee ("FIC") being obtained by the purchaser at least seven (7) days before the completion date (hereinafter referred to as "the approval date-line");

(b) Within seven (7) days from date hereof, the purchaser shall submit its application for the purchase of the said property to the FIC for its approval ("the FIC's approval"). If the purchaser shall fail to do so, the vendor shall be at liberty to treat this agreement as having been rescinded by the purchaser and this agreement terminated in the manner described in Clause 4 below.

(c) The vendor shall give the purchaser all such information as the purchaser may require for the said application.

(d) As soon as FIC's approval is issued (whether on conditions or otherwise), this agreement shall become unconditional and the sale herein shall be completed in the manner herein provided.

4. (a) If the purchaser (through no fault, action, default of omission on his part) shall fail to obtain the FIC's Approval on or before the approval date-line the vendor shall then refund to the purchaser the deposit with interest in the manner described in Clause 5(b) below and thereafter this agreement shall become null and void and be of no effect and neither party hereto shall be entitled to claim any damages, compensation, costs or otherwise from the other.

(b) For the purpose of Clause 4(a) above, the vendor agrees that the first rejection (if any) by the FIC of the application of the purchaser for the FIC's approval issued before expiry of the approval date-line, shall not be deemed to be failure on the part of the purchaser to obtain the FIC's approval if the purchaser shall forthwith submit its appeal to the FIC for a review of its decision. Provided always that if the FIC shall fail to render its decision or reject such appeal by the approval date-line, the purchaser shall be deemed to have failed to obtain FIC's approval pursuant to Clause 3 above and the provision of Clause 4(a) shall apply.

5. (a) Immediately upon receipt of the deposit, the vendor shall place the deposit in a monthly fixed deposit account ("the fixed deposit account") to be opened by the vendor with a licensed commercial bank as may be selected by the vendor (which shall include the vendor itself) and the fixed deposit account shall be automatically renewed until the deposit is withdrawn by the vendor on determination or completion of the transaction herein contemplated.

(b) In the event the vendor is required to refund the deposit together with interest to the purchaser pursuant to the terms hereof, the purchaser acknowledges and agrees that it would have been fully paid and satisfied by:

(i) the vendor withdrawing the deposit and all interests payable thereunder from the fixed deposit account on a date nominated by the purchaser; and

(ii) the vendor paying the purchaser all sums withdrawn from the fixed deposit account.

6. (a) Provided that the purchaser shall have made full payment of the purchase price and all other monies as are due hereunder and has observed and performed all the covenants stipulations and conditions herein set out as are on its part to be observed and performed, the vendor shall on the completion date at the office of its Solicitors Messrs Adnan Sundra & Low, Advocates and Solicitors of 2nd Floor, Wisma Budiman, Persiaran Raja Chulan, Off Jalan Raja Chulan, 50200 Kuala Lumpur (hereinafter called ("the vendor's solicitors") deliver all the following documents described in Clause 6(b) below to any one of the following persons at the election of the purchaser:

(a) the purchaser, or

(b) the authorised solicitors of the purchaser; or

(c) if the purchaser shall take a loan to purchase the said and, the financiers (or the solicitors of the financiers) granting the loan to the purchaser.

(b) The documents above referred to in clause 6(a) are:

(i) a valid and unstamped registrable memorandum of transfer of the said property duly executed by the vendor in favour of the purchaser or its nominee or nominees;

(ii) the issue document of title to the said property free from all encumbrances whatsoever;

(iii) all other documents as are necessary to effect registration of the said property into the name of the purchaser or its nominee or nominees free of all liens, charges, mortgages or other encumbrances:

(iv) the current quit rent receipts.

(c) Upon receipt of the documents above described in clause 6(b), the purchaser shall transfer or cause the transfer of the said property into its name or that of its nominee or nominees as soon as possible.

7. (a) If for any reasons other than that stated in clause 4 above, the purchaser shall fail to pay any or any part of the monies due on the completion date, the vendor shall be entitled to:

(i) seek specific performance of the contract and for the purpose thereof, the parties hereto expressly agree that the alternative remedy of monetary compensation shall not be regarded as compensation or sufficient compensation for any party's default in the performance of the terms and conditions herein; or

(ii) treat this agreement as having been repudiated by the purchaser and upon the vendor issuing notice thereof to the purchaser, this agreement shall be null and void and of no effect whatsoever.

b. In the event of clause 7(a) (ii) above,

(i) the vendor shall be entitled to deal with or otherwise dispose off the said property in such manner as the vendor shall see fit as if this agreement had not been entered into;

(ii) the deposit together with all interest accrued thereunder shall irrecoverably be forfeited to the vendor and shall be retained by and thenceforth belong to the vendor and shall not be refunded to the purchaser in any circumstances;

(iii) neither party hereto shall have any further claim against the other for costs damages compensation or otherwise.

8. In the event of the purchaser performing and observing all terms covenants and conditions on its part herein contained and the vendor shall refuse to complete the sale on the completion date, the purchaser shall at its option be entitled either:

(a) to seek specific performance of the contract and for the purpose thereof, the parties hereto expressly agree that the alternative remedy of monetary compensation shall not be regarded as compensation or sufficient compensation for any party's default in the performance of the terms and conditions herein; or

(b) to a refund of the deposit in the manner described in clause 5(b) above and upon payment thereof, this agreement shall be null and void and of no effect whatsoever and neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise

a 9. ...

10. (a) ...

(i) ...

(ii) ...

(b) ...

b (c) ...

(d) ...

11. ...

12 (a) ...

(b) ...

c (c) ...

13. ...

14. ...

15. (a) ...

d (b) ...

16. The vendor hereby represents and warrants to the purchaser as follows:

(a) The vendor has good, marketable, absolute and indefensible title to the said property and can pass such title to the purchaser subject to the terms and conditions hereof; and

e

(b) pending completion of the sale herein and registration of the transfer of the said property in favour of the purchaser, the vendor shall not sell transfer charge or otherwise howsoever deal with the said property or any part thereof or any interest therein or make the same subject to any burden charge encumbrance liability or lien whatsoever or make any application for the alteration of the category of land use or for the imposition of any fresh category of land use in respect of

f

g the said property or for the rescission removal or amendment of any conditions or restriction affecting the said property or lease or let out or grant any licence or otherwise howsoever part with the possession of the said property or any part thereof without

h the written consent of the purchaser first had and obtained.

17. (a) ...

(b) ...

(c) ...

i (d) ...

18. (a) ...

(b) ...

(c) ...

19. ...

20. ...

21. ...

22. Time shall be of the essence of the contract in relation to all the provisions of this agreement.

23. ...

24. ...

25.(a) ...

(b) ...

In witness whereof the vendor and the purchaser have hereunto set their respective hand and seal the day and year hereunder written.

Signed by)
as the duly authorised attorney)
of the vendor, Development &)
Commercial Bank Berhad on the)
day of 1989 in the presence of:-)

The common seal of the purchaser)
Finmark Consultants Pte. Ltd.)
was hereunto affixed on the)
day of 1989 in the presence of:-)

The option agreement together with the annexed sale and purchase agreement will be hereafter called collectively the said option agreement, but when any particular clause is hereafter mentioned, it shall be referred to as any clause of the said option agreement or any clause of the said sale and purchase agreement as the case may be.

A the outset, it is desirable to make it clear that 2 cash payments from the purchaser to the vendor for the sums of RM100,000 and RM50,000 respectively have been substituted for the 2 bank guarantees for the same sums as described in clauses (2) and (4) of the said option agreement respectively. No issue turns on this in this appeal before us.

Both the sum of RM100,000 and RM50,000 in pursuance 'of the said clauses (2) and (4) were paid with the result that the period for the purchaser to buy the said land was extended to 5.00 p.m. on 27 November 1989. By clause 6 of the same, time was made the essence of the contract.

a Unknown to both parties, on 15 November 1989, 2 caveats were lodged against the said land by some separate third parties. The said 2 caveats which sparked off the legal battle between the parties before us have since been removed subsequently before the hearing of the present appeal before us. This removal will *b* of course assist us in the exercise of our discretion as to whether to grant specific performance or not.

Very briefly the purchaser sued, praying for specific performance of the agreement to sell the said land to it, injunction to restrain the *c* vendor from selling the said land to others, damages for breach of contract in lieu of, or in addition to specific performance.

The vendor pleaded the said 2 caveats, denying any breach or repudiation of contract on its part and pleaded further that the purchaser *d* had failed to exercise the option to purchase by 27 November 1989.

The facts and circumstances of this case are crucial.

Having regard to the option agreement set out above, the last day for the purchaser to deliver *e* up all the documents and pay RM3.5 million (being 10% of the purchase price), to the vendor at the vendor's solicitors' office in pursuance of clause 5 of the option agreement was 27 November 1989. As the date was approaching, the purchaser began a flurry of activities. Mr. Su *f* (PW1), the purchaser's solicitor, "faxed" a letter dated 23 November 1989, on the same day as the date of the letter requesting for an appointment or meeting with the vendor's solicitors for delivery to the said solicitors of the documents and making the payment.

g According to Mr. Su, no response (confirmation) to his request for an appointment at 4.00 p.m. on 24 November 1989 at the vendor's solicitors' office was received and this was followed by a number of telephone calls to them for their Mr. Sundra or Miss Ng, members of the said vendor's solicitors' firm. On 24 Novem*h* ber 1989, he wrote for confirmation of the requested appointment, enclosing "a copy of the Deutsche Bank's cheque for RM3.5 million", as an appetizer, perhaps.

A meeting of Mr. Su with the said Miss Ng at 12.00 noon on 25 November 1989 was finally *i* had.

The purpose of Mr Su's visit was of course, to hand over the documents and to pay RM3.5 million to Miss Ng representing the vendor. Armed with a covering letter dated 25 November 1989, all documents as required by clause 5 of the said option agreement and a bank draft or bank's own cheque for RM3.5 million from Deutsche Bank, Kuala Lumpur in favour of the vendor's name, Mr. Su with Joseph Lai and 3 other persons came to the office of Miss Ng. The letter dated 25 November 1989 is set out below:

T H Su & Co.
Advocates & Solicitors

16th Floor, UMBC Tower Annexe
Jalan Sultan Sulaiman
50000 Kuala Lumpur

25 November 1989

Messrs Adnan Sundra & Low
Advocates & Solicitors 2nd Floor,
Wisma Budiman Persiaran Raja Chulan
Off Jalan Raja Chulan
50200 Kuala Lumpur

Dear Sirs

Re: Option dated 29 August, 1989
State Lease 2875, Lot 413,
Mukim of Tebrau, District of
Johore Bahru

1. I act for Finmark Consultants Pte Ltd of No. 20, Kramat Lane, 02-01, United House, Singapore 0922.

2. I refer to the option dated 29 August 1989 (the Option) in respect of the above land (the Land) granted by your clients Development & Commercial Bank Berhad (D & C Bank) to my client.

3. Pursuant to the option my client hereby exercises the option and nominates Palm Crescent Sdn Bhd to purchase the Land. Accordingly, please find enclosed:

   (a) 4 copies of the sale & purchase agreement duly executed by Palm Crescent Sdn Bhd (the purchaser) which were already previously initialed by your clients. The name of Finmark Consultants Pte Ltd has been deleted and the name of Palm Crescent Sdn Bhd inserted onto the front cover, the 1st page and the last page of the sale & purchase agreement;

   (b) the resolution of the board of directors of Palm Crescent Sdn Bhd authorising the purchase of the land and the affixing of the common seal of Palm Crescent Sdn Bhd onto the above sale & purchase agreement;

   (c) a copy of the memorandum and articles of association of Palm Crescent Sdn Bhd: and

   (d) a copy of the certificate of incorporation of Palm Crescent Sdn Bhd; and

   (e) Bank draft for RM3,500,000 dated 24 November 1989 issued by Deutsche Bank (Asia) in Kuala Lumpur in favour of D & C Bank.

4. As the option has been duly exercised please request your client to return the sum of RM150,000 to my client as soon as possible. I have my client's instructions to request your client to make out the cheque of RM150,000 in favour of my firm.

   Pursuant to the commission letter dated 29 August 1989 please request your client to pay my client the sum of RM700,000 in due course. I have my client's instructions to request that the cheque of RM700,000 be made out in favour of my firm.

5. On 16 November 1989 Kassim Chan Management Consultants Sdn Bhd filed the application on behalf of Palm Crescent Sdn Bhd. A copy of the said letter of 16 November 1989 is enclosed for your attention.

   I have had 2 meetings with FIC on the matter with Mr. Brian Aw of D & C Bank. I am informed by Mr. Affendi of FIC that he will try to table the application on 1 December 1989 and if so, an answer is expected on 4 December 1989.

6. Mr. Joseph K S Lai of Messrs Allen & Gledhill is representing Palm Crescent Sdn Bhd in the purchase of the Land.

7. Please acknowledge receipt of this letter and all the documents aforesaid by signifying the same on the duplicate of this letter.

Yours faithfully
for T H Su & Co
Sgd

T H Su

cc - clients
- Allen & Gledhill
Attn: Mr Joseph K S Lai

Then at the meeting room of the vendor's solicitors, the said Miss Ng came to meet them. Miss Ng denied there was a prior appointment made to meet Mr. Su and his delegation. While Mr. Su was taking out all the documents in pursuance of clause 6 of the option agreement;

Miss Ng produced her letter of the same date of the 25 November 1989 for Mr. Su and the letter is set out below:

Adnan Sundra & Low
Advocates & Solicitors

2nd Floor, Wisma Budiman
Persiaran Raja Chulan
Off Jalan Raja Chulan
50200 Kuala Lumpur

25 November, 1989

Messrs T H Su & Co
Advocates & Solicitors
16th-Floor, UMBC Tower Annexe
Jalan Sultan Sulaiman
50000 Kuala Lumpur

Attention: Mr. Su Thiam Hock

Dear Sirs

Re: Option dated 29 August, 1989 in respect of land held under State Lease 2875 Lot 413 Mukim of Tebrau Johor Bahru ("the option")

We refer to your letter of 23 November 1989 whereby you advised us that your client intends to exercise the option on 24 November, 1989.

However prior to your client's exercising the option, we have been instructed by our client to inform you that two (2) caveats have been lodged on the above piece of land, one by Tan Sri Abdul Aziz and the other by Kota Tanah Realty Sdn Bhd both lodged on the 15 of November 1989.

Our client shall take all necessary steps to remove the aforesaid two (2) caveats. However in the meantime, we wish to draw to your attention that there is a possibility that completion of the sale may be delayed pending the necessary actions to remove the said two (2) caveats. Our client cannot perform what is beyond their ability in that if the caveats are still subsisting (despite all actions taken by our client to remove same) our client would not be able to transfer the land in favour of your client.

In view of the circumstances, please let us know whether your client still intend to exercise the option. If your client still desire to exercise the option, the sale and purchase agreement should be amended to duly reflect the revised circumstances.

Yours faithfully

Sgd

cc. Development & Commercial Bank Berhad
(Attention: Mr. Brian Aw)

After reading the letter from Miss Ng (DW2), Mr. Su became very angry, both Mr. Su's party and Miss Ng discussed some remedial steps nonetheless without reaching any consensus. They all agreed to meet again on 27 November 1989 at 11.00 a.m. at the same place.

On 27 November 1989, Mr. Su went to see Miss Ng with the same delegation, this time with the addition of 2 other persons. There, Miss Ng produced some draft containing a proposed amendment to the sale and purchase agreement to cater for the situation created by the said 2 caveats in question, involving changes to the sale and purchase agreement by adding a new para 2 of the recital, and new clauses 1, 2 and 3. Mr. Su informed Miss Ng that the amendment was unacceptable and offered a counter proposal which Miss Ng said she would not consider. Therefore Mr. Su wrote another letter dated 27 November 1989, referring in particular, to the indefinite period for the delivery of the registrable transfer by the vendor to the purchaser, and said he could only conclude that the vendor had repudiated the option agreement. Mr. Su wrote however that his client did not accept such repudiation and regarded the option agreement as still in force.

Miss Ng wrote back to deny such repudiation alleged by the vendor, for she was merely giving notice to the purchaser of the circumstances (about the said 2 caveats in question). She further wrote:

> Any amendments to the sale and purchase agreement were not instigated by our client but was a response to your client's request for amendments.

Further, ineffective discussion took place, then the writ, then the hearing at the High Court and now the appeal before us.

The claims of the purchaser were dismissed by the learned trial Judge. The issue framed by the learned trial Judge was as to whether the option agreement in question was repudiated by the vendor's letter dated 25 November 1989 handed to Mr. Su at the meeting room of the vendor's solicitors when Mr. Su was taking out and going to deliver the requisite documents and to make payment to Miss Ng.

On this issue, the learned trial Judge stated he was unable to follow the argument of the purchaser that the vendor was in breach because the vendor could not be blamed for the lodging of the said 2 caveats as such lodging was not the act of the defendant. Consequently about the letter dated 25 November 1989 from

Miss Ng to Mr. Su suggesting, *inter alia*, that amendments had to be made to the agreement of sale and purchase and to the effect that the vendor not perform because of the said 2 caveats, it did not amount to a repudiation of the said agreement.

The learned trial Judge held also that the vendor was not in breach of the said option agreement and that the action of the purchaser was dismissed for the following reasons:

(1) The lodging of the said 2 caveats was not the act of the vendor who could not, be blamed.

(2) The purchaser had by its letter dated 27 November 1989 made its stand clear that it did not accept any repudiation and that it regarded the option agreement as still subsisting.

(3) The purchaser must exercise the option to buy and had not done so by 27 November 1989.

(4) The option agreement was a unilateral contract, and the defendant was not obliged to do anything until the option was exercised.

(5) The removal of the said 2 caveats would not be difficult and it was premature for the purchaser to say that the vendor was in breach.

We deal first with the reasons of the learned trial Judge before we give our conclusions, though the two frequently overlap.

Although the lodging of the said 2 caveats by third parties was not the act of the vendor, the completion date was 30 December 1989. The performance by the vendor of delivery of the memorandum of transfer, issue of document of title for registration in favour of the purchaser free from all encumbrances by 30 December 1989, became impossible because of the said 2 caveats, from all accounts, and hence the necessity for amendment to the agreement of sale and purchase to take account of the removal of these 2 caveats requiring more time beyond 30 December 1989. Please see clause 2(b) and clause 6 of the sale and purchase agreement annexed to the said option agreement. Could the vendor be blamed for such (un)expected impossibility?

To find out, one must look for any express provision in the option agreement and the sale and purchase agreement annexed to it which may govern such a position. There is none. Further there is also no *force majure* clause to excuse performance by the vendor on account of any extraneous event obstructing the performance with the vendor having no control at all over such event and through no fault of the vendor.

If a party makes an unqualified or absolute promise, he accepts the risk of the performance of that promise becoming impossible. He will not be discharged from liability if performance becomes impossible through no fault of his own. To illustrate, take the old case of *Paradine v. Jane* [1647] Allyn 26 in which a lessee was held to be still liable to pay rent even if he was driven out of the demised premises during the civil war.

Both parties have wisely not resorted to the doctrine of frustration of contracts. There is no need for us to comment on it further.

About the purchaser writing on 27 November 1989 to inform the vendor of its not accepting the repudiation by the vendor and treating the option agreement as still subsisting, it was a stand which the innocent purchaser was perfectly entitled then to take, if the learned trial Judge meant that the purchaser could not do so.

About the learned trial Judge's opinion that the said option agreement was a unilateral contract, we are unable to agree with the learned trial Judge for a unilateral contract binds one side only legally, such as a person offering a certain reward for any finder of a lost dog.

Here, the option agreement would bind both sides. Looking at the said option agreement, in particular, its clause 8, the vendor is bound to sell the said land to the purchaser. The purchaser is bound to "exercise the option" to buy the said land by the 27 October 1989, failing which he has to pay RM100,000. If time for exercising the option to buy the said land is extended to 27 November 1989, and if the purchaser fails to exercise the option to buy the said land by that extended date, the purchaser has to pay the vendor another RM50,000 in addition. There is really no option granted to either not to buy or not to sell as the case may be.

Then again his Lordship said the purchaser had not exercised the option. This Court will take it to mean that the purchaser has failed to comply with clause 5 of the said option agreement. We will deal with it later.

On the question as to whether the vendor had repudiated the said option agreement on 25 November 1989, so much energy was directed to this question, that we feel we need to deal with it in some detail.

When Miss Ng produced her letter to Mr. Su on 25 November 1989, (the terms of which have been set out earlier), Mr. Su had good reason to conclude that the letter meant the vendor could not perform its contract in some essential respect, ie. signing a valid and registrable transfer on 30 December 1989, and a clear expression of the vendor's intention not to be bound by the said option agreement. Since the time for performance on the 30 December 1989 had not arrived, the breach of contract on the part of the vendor was an anticipatory breach, see *Martin v. Stout* [1925] AC 359. Still the vendor would be in breach even if it really intended to perform the said option agreement subject to an amendment to the sale and purchase agreement on terms to provide for time to remove the said 2 caveats, for it led Mr. Su equally to believe that the vendor no longer intended to be bound by the provisions of the said option agreement, i.e. to deliver a valid and registrable transfer free from all encumbrances, on or before 30 December 1989, see eg. *Universal Cargo v. Citati* [1957] 2 QB 401 and 436.

We are of the view that the conduct and circumstances on 25 November 1989, primarily with regard to Miss Ng's letter, amounted to a repudiation of the said option agreement when it was still executory, for the time for performance by the vendor to deliver a valid and registrable transfer of the said land from all encumbrances on or before 30 December 1989, had not arrived, and therefore there was an anticipatory repudiation of the said option agreement on the part of the vendor.

In the face of such antipatory repudiation, the purchaser had two choices as explained by Lord Ackner in *Fercometal v. Mediterranean Shipping Co. (HL)*, [1988] 3 WLR 200 at 212:

> When A wrongfully repudiates his contractual obligations in anticipation of their time for performance, he presents the innocent party B with two choices. He may either affirm the contract by treating it as still in force, or he may treat it as finally and conclusively discharged. There is no third choice ...

When Mr. Su wrote on 27 November 1989, he expressly stated that he wanted the contract to be kept alive. This, Mr. Su was perfectly entitled to do. He took Lord Ackner's first choice stated above. It must be remembered that the said option agreement survived and remained for the benefit of both parties.

Now both the learned trial Judge and the learned Counsel for the vendor said that by 27 November 1989, the purchaser "had not exercised the option". What they both meant was that the purchaser had failed on or before 27 November 1989 to deliver the requisite documents and make the requisite payment to the vendor in pursuance of clause 5 to the said option agreement. This point was well taken, though taken rather laconically.

The conduct and circumstances of the parties on 25 November 1989 comprising principally the letter handed over by Miss Ng to Mr. Su, seem to be causing somewhat, (without deciding at all such causation), the purchaser to refrain from pressing on with the delivery of the said requisite documents and the payment of the said requisite sum, but this Court is under no duty to decide as to whether estoppel applies. Estoppel, as a rule, should be pleaded. The purchaser has not pleaded it in any pleading.

The Court is left with having to consider only those 2 choices mentioned by Lord Ackner in *Fercometal supra*. We did not quite finish the quotation from Lord Ackner set out above. His Lordship continued at page 212:

> There is no third choice, as a sort of *via* media, to affirm the contract and yet to be absolved from tendering performance unless A gives reasonable notice he is once again able and willing to perform. Such a choice would negate the contract being kept alive for the benefit of both parties ...

In other words, as someone said in this connection, there is no half-way house.

Therefore, legally the purchaser, by not complying with clause 5 of the said option agreement in regard to the requisite documents and the requisite payment, has itself subsequently

caused as well an anticipatory breach of the said option agreement in a similar way, though not in a reprehensible way.

However, when there is an anticipatory repudiation of an executory contract as in this option agreement, such a contract continues in existence until the innocent party makes known his intention to accept such repudiation, otherwise to quote the well-known and oft-quoted statement that "an unaccepted repudiation is a thing writ in water". per Asquith LJ in *Howard v. Pickford Tool Co* [1951] 1 KB 417, 421.

The vendor has never made known its intention to accept such anticipatory repudiation at all. The said option agreement continues its existence.

For reasons given above and after due consideration, we are of the opinion that the lower Court has erred in declining to decree specific performance.

There is a another point about the total sum of RM150,000 paid by the purchaser to the vendor, which would have to be dealt with accordingly to the terms and according to the construction of the terms of the said option agreement. Such being the case, the said sum would have to be refunded if this Court decrees specific performance.

For the wrongful anticipatory repudiation on 25 November 1989 on the part of the vendor balanced or countered by the wrongful anticipatory repudiation on or by 27 November 1989 on the part of the purchaser, since we are also going to grant specific performance, we will order that no damages be paid by either party.

We therefore allow the appeal, setting aside the judgment of the lower Court. We further order that the said option agreement dated 29 August 1989, together with a sale and purchase agreement as annexed thereto and forming part of the said option agreement be carried into effect on the following terms and directions:

(1) Defendant do pay the sum of RM150,000 to the plaintiff within 21 days from today without any interest up to the end of 21 days from to-day, and if not paid thereafter, it shall carry the usual decretal interest.

(2) The said option agreement dated 29 August 1989 together with the said sale and purchase agreement as annexed thereto subject to the terms of this order as regards the times for doing any act or making any payment, be carried into effect *mutatis mutandis*.

(3) The plaintiff do deliver all the documents and make payment by a banker's order or cheque of the sum as required under clause 5 of the said option agreement within 21 days from to-day.

(4) The plaintiff do further pay the balance of the purchase price of the said land, (such balance being the sum of RM31.5 million), within a period of 33 days from the expiry of the 21 days mentioned in paragraph (3) above of this order.

(5) The defendant do deliver to the plaintiff a valid and unstamped registrable memorandum of transfer of the said land, and the issue document of title of the said land and all other documents as stated in clause 6 of the sale and purchase agreement as annexed to the said option agreement upon the payment of the said balance of purchase price stated in paragraph (4) above of this order.

(6) All that is required to be done under paragraphs (3), (4) and (5) above of this order should be done at the office of the present solicitors of the defendant.

(7) The whole of this order is subject to both parties carrying out all other requirements as set out in, and in accordance with the said option agreement together with the agreement of sale and purchase as annexed to it and not specifically mentioned in this order.

(8) That parties hereto be granted liberty to apply to this Court for further directions in connection with the implementation of this order by motion.

(9) That the defendant do pay costs to the plaintiff here and in the Court below.